IN THE

Supreme Court of the United States

_____ Term, A. D., 1953

No. _____

ELMER VOGT, PETITIONER,

versus

THE STATE OF TEXAS, RESPONDENT.

A Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas, Located at Austin, Tex.

TO THE HONORABLE JUSTICES
OF THE SUPREME COURT:

Now comes Elmer Vogt, the petitioner in the above entitled and numbered cause, complaining of the State of Texas, the respondent herein, and petitioning and applying for a writ of certiorari to the Court of Criminal Appeals of Texas, located at Austin, Texas, and for cause the petitioner says:

1. STATEMENT OF THE MATTER INVOLVED:

(a) The petitioner, Elmer Vogt, resides in San Antonio, Bexar County, Texas, and, as the defendant in Case No. 95,045, in County Court at Law, No. 2, of Bexar County, Texas, located at San Antonio, Texas, was tried and convicted, upon Information and Complaint, for Unlawfully Carrying a Pistol, being tried only before a judge, a jury having been waived, and the said conviction was on the 1st day of December, A. D., 1952.

(b) Legal exceptions were duly made to the said conviction and motions were duly entered for a new trial and in arrest of judgment, and at the hearing on the motion for new trial on the 28th day of January, A. D., 1953, the trial court overruled the motion for new trial.

(c) The petitioner, as the defendant in the court of trial, gave notice of appeal from said judgment of trial court, a fine of $125.00 and costs, and duly appealed said case to the Court of Criminal Appeals of Texas, located at Austin, Texas, and said case, in said court of appeals, was No. 26,445, and entitled Elmer Vogt versus the State of Texas.

(d) The said case on appeal, as entitled and numbered above, was duly docketed and heard, and in OPINION rendered by said court of appeals, May 20, A. D., 1953, judgment was affirmed, after which Appellant's First Motion for Rehearing was duly filed, heard by the appellate court and overruled, without written opinion on June 24, A. D., 1953, and the court issued a mandate therein at once, without waiting for filing of Appellant's Second Motion for Rehearing, and the petitioner herein duly applies for Writ of Certiorari.

2. LAW USED BY THE STATE OF TEXAS TO PROSECUTE:

Art. 483 — Unlawfully Carrying Arms, as found in Penal Code, State of Texas, Revised Statutes of the State

of Texas, which says, "Whoever shall carry on or about his person, saddle or saddle bags, or in his portfolio or purse any pistol, etc., shall be punished by a fine of not less than $100, nor more than $500 or by the confinement in jail for not less than one month nor more than one year."

3. LAWS AND DEFENSES USED BY DEFENDANT IN TRIAL:

(a) Art. 484, Not Applicable, as found in Penal Code, State of Texas, Revised Statutes of the State of Texas, which says, "The preceding article, which is Art. 483, shall not apply to a person in actual service as a militiaman, nor to any peace officer in actual discharge of his official duty, nor to the carrying of arms on one's own premises or place of business, nor to persons traveling, etc."

(b) Defendant showed by uncontroverted and undisputed evidence that he was a traveler, having driven from San Antonio, Bexar County, Texas, to a point near Boerne, Kendall County, Texas, and at night, and had driven back to Bexar County, Texas, when arrested; that he had moved his domicile just before starting on trip and forgot to remove said pistol from locked glove compartment of car, as well as an alarm clock, school books and clothing; that defendant was not driving his car at the time, but said car was parked at a roadside drive-in, and his friend was out of car making a purchase; that defendant had not been driving car just prior to arrest; that said officers were not looking for defendant, and saw no felony committed; that said officers had no knowledge of said pistol; that said car was seized without a search warrant, and said defendant arrested without a warrant; that said pistol was later taken from said car after officers had impounded same and after defendant had been arrested without being told why, and had been jailed; that no circumstances are shown by any convictions that either said defendant or his friend had broken any other laws, whereby said ar-

resting officers acquired extraordinary rights of search and seizure without warrants, or acquired right to seize and impound said car and private property of defendant, and violate locks of same and search and seize said pistol; that said pistol was not loaded, and was an heirloom from defendant's lately deceased father, a resident of Boerne, Kendall County, Texas.

(c) The defendant pleaded that under said Art. 484, he should be exempted from said conviction; that he should be exempted from conviction because he had lately moved said pistol and had forgotten to remove same before he set out on journey to Kendall County, Texas; that he had not intentionally carried said pistol; however, as a traveler, he was entitled to exemption of conviction, under the laws of Texas and said Art. 484 in particular, because he had traveled to Kendall County, Texas.

(d) The defendant pleaded that such arrest was unlawful and illegal; that the arresting officers, having no search warrant and having no warrant for said arrest, had no right to make said arrest and seizure; that the evidence and said pistol which were acquired were unlawfully used as evidence against the defendant to convict him; that arresting officers, seeing no felony, and not searching for felons, and not seeing even a misdemeanor committed, as supported by any conviction, were acting in an unlawful manner in making said arrest, search and seizure; that full objections and bills have been placed in the record by the petitioner.

(e) The petitioner pleads now, and has pleaded below, that he has not received a fair and constitutional trial herein, as guaranteed by the United States; that the defendant below failed to receive the benefits of said Art. 484, and other laws, as well as the Texas Bill of Rights, the United States Bill of Rights, and other considerations

which are due to be given him as a citizen of Texas and the United States; that unlawful and illegal evidence was used to convict him; that the said unlawful evidence, and the illegally-seized pistol as well should not have been used to convict said defendant; that regardless of the said OPINION such said unlawful seizure and use in evidence continued to be an issue, even though said defendant admitted possession of said pistol, because the State introduced said pistol and unlawful seizure into case, at beginning of trial, over exceptions of defense, and said admission did not cure any breach of the Bill of Rights, to which defendant was born, and in no case would justify arrest without warrant and search without a warrant.

4. JURISDICTIONAL STATEMENT:

(a) It is suggested that the United States Supreme Court has the jurisdiction to review this cause which is herein submitted because it involves particular matters which have been appealed to the highest court for criminal matters in the State of Texas, and there is no opportunity for further relief in said court of Texas.

(b) The petitioner presents that he failed to receive a fair and constitutional trial which the United States has guaranteed to him as his birthright and as his right as a citizen.

(c) The petitioner alleges that he was unlawfully arrested in this cause, and subjected to an unlawful search and seizure of his property, and that said unlawfully-acquired evidence was unlawfully used to convict him in the courts below, and all of such matters and procedure is contrary to the Bill of Rights of Texas, the Bill of Rights of the United States and other laws and rights which can be enforced by the United States and the Supreme Court herein.

5. QUESTIONS PRESENTED:

(a) The petitioner, as the defendant in the court of trial, failed to receive a fair and constitutional trial, as guaranteed by the United States.

(b) The petitioner, as the appellant in the Court of Criminal Appeals of Texas, has exhausted his remedies therein, since that is the court of last resort in such cases, and further relief was completely shut off and blocked, as aforesaid.

(c) The ancient right of a subject or citizen, as derived from the former heritages, as well as the Bill of Rights of the State of Texas, and the United States, is herein invoked, and the record will show that the said arresting officers had no search warrant and no warrant for said arrest, and that said car of said defendant was impounded, violated and unlocked and searched after arrest and jailing of said defendant, and such procedure violates the Bill of Rights and the Constitution of the United States, and the Supreme Court of the United States has jurisdiction of same, and can do, or undo, what has been done herein in said case.

(d) The Supreme Court has the power and jurisdiction to herein determine if the said defendant received the benefit of the said Art. 484, in that he was a traveler, as established by said uncontroverted and unimpeached evidence, and to which he cites the court in the cause of justice, as well as equity, and which is of equal rank with laws in Texas, and to which a citizen thereof is entitled.

6. REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT:

(a) The Court of Criminal Appeals of Texas, the highest court which had jurisdiction in Texas, has refused further relief, as indicated and set out above.

(b) The said defendant failed to receive a fair, impartial and constitutional trial, as guaranteed to him by the Bill of Rights of the United States, and the Supreme Court reviews such cases.

(c) The said defendant suffered a false and unlawful arrest, as well as an unlawful search and seizure of his property without a search warrant and without a warrant for arrest, said arrest and seizure being without legal cause and contrary to the rights of said defendant as a citizen of the United States.

(d) The petitioner alleges that the entire procedure, the said arrest, search, seizure, jailing, trial, etc., were without due process of law, and that his rights as a citizen were invaded and disregarded in an arbitrary and unwarranted manner.

Wherefore, the petitioner prays that a writ of certiorari issue under the seal of the Supreme Court of the United States, and directed to the Court of Criminal Appeals of Texas, located at Travis County, Texas, commanding said Court of Criminal Appeals of Texas to certify and send to this court a full and complete transcript of the record of the above entitled and numbered cause and all the proceedings of said cause in the said Court of Criminal Appeals of Texas which have transpired and have been recorded in said court concerning the said case, being in said court recorded as Case No. 26,445, Elmer Vogt, Appellant, versus The State of Texas, Appellee, to the end that this cause may be reviewed and determined by this Supreme Court of the United States, as provided by the Statutes and Laws of the United States, and that the judgment herein of the said Court of Criminal Appeals of the State of Texas be reversed by this court, and the petitioner prays for relief, general or special, either at

law or in equity, and, praying for all things to which he may be herein entitled, the petitioner prays for justice herein.

Dated September ....., A. D., 1953.

.....

FLOYD DUKE JAMES,
Counsel for Petitioner.

Brief in Support of Petition for Writ of Certiorari.

TO THE HONORABLE JUSTICES
OF THE SUPREME COURT:

JURISDICTION:

It is believed that the Supreme Court of the United States has jurisdiction and legal right of review herein concerning the above-entitled and numbered cause, being Case No. 26,445, Elmer Vogt versus The State of Texas, Unlawfully Carrying a Pistol, having been heard and finally acted upon by the Court of Criminal Appeals of Texas, on June 24th, A. D., 1953, when said court overruled appellant's first motion for rehearing, and then issued a mandate therein without waiting for any further motions, and the said Court of Criminal Appeals of Texas is the court of final jurisdiction in such matters in the State of Texas, and the petitioner presents that he was not allowed a fair and constitutional trial, such as the United States guarantees him, as a citizen of the United States, and that he was thereby deprived of his said rights as a citizen, and also, being falsely arrested and wrongfully processed and convicted, he was the object of arrest for a misdemeanor without a warrant, and without arresting officers seeing or knowing of any such offense. He was charged and tried, and convicted, and he was also searched, as well as his automobile, without a search warrant, as guaranteed by the Bill of Rights of Texas, and by the Bill of Rights of the United States, and appeal is herein made for the preservation of such rights, indicated in said Bills of

Rights, the Common Law, Equity, the Laws of the State of Texas and Laws of the United States, respecting restrictions and limitations on searches and seizures, arrests, and liberties of citizens and enjoyment of same and property, and for further reference note Brief of Appellant on page 77, all of which is incorporated herein, and also note Defendant's Special Exceptions to Information and Complaint, pages 6 to 7, Defendant's Special Exceptions to Arrest and Imprisonment, pages 8 to 9, and Defendant's Bills of Exceptions, Nos. 1 to 7, inclusive, from page 16 to 22, all of which, by reference, are incorporated herein.

LAWS INVOKED BY PETITIONER TO SUSTAIN JURISDICTION:

1. Bill of Rights of the State of Texas, Constitution of the State of Texas, and in particular, Art. I, Sec. 9, which says, "The people shall be secure in their persons, houses, papers, and possessions, from all unreasonable seizures and searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

2. Bill of Rights, Constitution of the United States, and in particular Article IV which says, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. Bill of Rights, Constitution of the United States, and in particular Article V, and that portion which says, * * * "nor shall he be compelled in any Criminal Case to

be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

4. Article 454. Bail in Misdemeanor, as found in Revised Statutes, Code of Criminal Procedure, State of Texas, which says, "Any officer making an arrest under a capias in a misdemeanor may in term time or vacation take bail of the defendant."

SOME OF IMPORTANT MATTERS AND POINTS IN RECORDS:

1. The State of Texas, acting by Assistant District Attorney, as indicated in Brief and Argument of Appellee, trying to show other offenses and charges, trying possibly to show right of officers to proceed without warrant and search warrant, indicated several extrinsic matters which could not be substantiated by judgment or final convictions, and reference is made to Brief and Argument of Appellee, beginning on page 91, and extending to page 96, and same methods were complained of throughout the whole trial of said case. In particular note on page 94, the effort to show justification for such unwarranted search and seizure, as at top of page, as quoted: "The case at bar falls within the above cited rules of law. In the instant case the appellant and one Kenneth Wheeler, the driver of appellant's car, were speeding." In regard to such matters note Statement of Facts, testimony of Oscar Warnke, arresting officer and deputy sheriff of Bexar County, Texas, who testified, as indicated on page 50, and who said that Wheeler was driving the car, that the car belonged to Vogt, and that Wheeler was charged with drunk driving. Such matters were excepted to by defense, as found in following record, but the trial court refused to sustain said objections. Only Vogt was on trial for said offense of unlawfully carrying pistol, and other matters

and other persons did not have a place in said case. Note that no records of any other final convictions of either Vogt or Wheeler appears in the record; however, Wheeler, driver of said car, and the only one who could have been prosecuted for Driving While Intoxicated, was acquitted of same by a jury in same court as indicated by EXHIBIT A, on page 83, Appellant's Brief, the original certified copy of which is on file in the Court of Criminal Appeals of Texas. With further reference to the above statement of State in Appellee's Brief and Argument, stating that appellant and Wheeler were speeding, note the further testimony of Deputy Sheriff Warnke, at bottom of page 51 and top of page 52, saying that the case in Bacon's (Justice of the Peace) court was appealed, and that he could not back up the case of speeding against Wheeler, that he did not clock him and did not know how fast he was running, etc." Such testimony in the records of the State fail to support such a statement of said Assistant District Atttorney who wrote for the record, as above, that appellant and one Kenneth Wheeler were speeding, whereas, such matters fail to show any legal reasons and legal rights on the part of the State to set aside the laws and ignore the Bills of Rights and search, and seize without warrants, search warrants and due process of law.

2. On pages 52 to 63, said Deputy Sheriff Warnke says that he had never seen defendant before; that he knew of no reason why he would have it in mind to pick on him or insult him; that he went over to defendant's parked car and took him out of his car; that he had not heard him call his name on the road; that he did not have a warrant for his arrest and did not have a search warrant to search defendant's car; that defendant had not given permission for him to go into his car and search it and take anything out of car and seize anything; that another arresting of-

ficer had defendant's car keys and searched car; that he did not know whether or not defendant and companion were just cutting up and yelling and laughing with a radio; that he and officers had made a call to Twin Mountains on that night, and that the officers had no reasons to suspect that the defendant was a felon or criminal of any kind.

3. Note testimony of another arresting officer, Ted Lacey, District Attorney's office, on page 29, saying that he was with officers on routine check; note pages 36 to 37, where witness Lacey says that defendant's car was brought to lot near sheriff's office; that defendant's car was searched; that he unlocked glove compartment of car; note bottom of page 37 to 38, showing that said unlawfully seized pistol was used as an Exhibit A in evidence, and over exceptions and objections of defense.

4. Note OPINION, page 99, saying that pistol ceased to be an issue when defendant admitted possession and presence of pistol. The petitioner can not agree with same, or agree to application of case of *Soble versus State*, 218 S. W. 2nd 195. The pistol was seized contrary to laws and the Bills of Rights, and a mere statement of defendant, admitting the truth, after admission of Exhibit A, does not destroy said laws and Bills of Rights, given by charter, which can not be destroyed by mere cases and testimony. Such utterance of truth was not an admission of guilt. The State was required to make her own case, and prove same. Separate and apart from considerations of illegal searches and seizures, the pistol was to be considered as an issue in other matters and under other laws, and to determine if defendant was entitled to exemption of conviction because he was a traveler, because he had lately moved, etc.

5. Note Appellant's First Motion for Rehearing, pages 101 to 107, and in particular refer to various cases which are cited in paragraph 13, page 106, showing that said defendant in court below should have been considered as a traveler.

6. Note Brief of Appellant, pages 77 to 90, and in particular note paragraphs 31 and 32, pages 89 to 90, wherein it is shown that the defendant's carrying said pistol was not an offense against the laws.

7. The record will show that the State failed to show any bad intention on the part of the defendant, or that said pistol was for any criminal use.

8. The record will show that the defendant had moved; that he forgot to remove some of his effects before setting out for his mother's home in Boerne, Kendall, County, Texas, and such effects consisted of said pistol, an heir-loom from his father, as well as an alarm clock, school books, etc., and it is no cause for his conviction herein because, as a personal liberty, he turned back just before he reached Boerne, Texas, in Kendall County, Texas, possibly about 25 miles away from San Antonio, Bexar County, Texas, and considerably over in said adjoining Kendall County, Texas.

9. Petitioner pleads that more consideration might well be given to the fact that the automobile has become a temporary abode, and, in some cases, a permanent dwelling place or abode for many persons. Since said cars are such, and since they are often locked, and since such cars can carry travelers farther in a few minutes than a horse could travel in the old days, it appears that persons traveling in such cars are entitled to more consideration concerning time, place and distance, than travelers who rode upon horses and carried arms in pockets or saddle-bags.

Surely such matters have changed with time and progress. Surely the laws and exemptions concerning such matters should not be required to protect only those travelers who are gone more than a day. In a consideration of time it appears that a part of a day is a whole day, and petitioner can not agree with OPINION, bottom of pages 99 to 100, which states that in *George versus State*, 90 Tex. Cr. R. 179, 234 S. W. 87, and in which the court called attention to the fact, that the court was aware of no case where one was held to be a traveler whose absence was for less than a day. Note *Campbell versus State*, 58 Cr. R. 349, 125 S. W. 839, 21 Ann. Cas. 447. Defendant had traveled a distance of 25 miles and was preparing to camp out; held, that he was a traveler. Also note *Campbell versus State*, 28 Cr. R. 44, 11 S. W. 832. A person going from one county to another, or *contemplating* a journey, about to board a train, is a person "traveling."

STATEMENT OF CASE:

This has already been stated in the preceding petition, which is hereby adopted and made a part of this brief.

ARGUMENT:

The appellant testified that he had been arrested without being told why by the said arresting officers who testified for the State; that his car had been taken over by said officers, taken to San Antonio, Texas, and impounded, unlocked and searched without his permission, and that he was jailed, and later filed upon for said prosecution, unlawfully carrying a pistol.

The arresting officers admitted taking over the car of defendant without warrant for defendant's arrest, and admitted to searching said car without a search warrant

after car had been impounded and defendant jailed in San Antonio, in the county jail.

The defendant pleaded unlawful arrest and search and seizure without warrant in his defense, but the State convicted him, without a jury, which was waived, and assessed a punishment of $125 fine and costs, from which defendant appealed to the Court of Criminal Appeals of Texas, and the appellant pleaded that such arrest and seizure and acquisition of State's evidence was unlawful, and that, as a traveler, under the laws of the land, he was entitled to exemption of conviction, and the State overruled such pleas and defenses and motions and confirmed judgment of the court below.

The petitioner herein again pleads that he failed to receive a fair and constitutional trial, in due process of law, to which he believes himself entitled, and for the reasons, as stated in the record, he appeals and petitions for a writ of certiorari.

It is therefore respectfully submitted that this case is one calling for the exercise of supervisory powers, as vested by law in this court, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

FLOYD DUKE JAMES,
Majestic Bldg.,
San Antonio, Texas,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 380

ELMER VOGT,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN BEN SHEPPERD
Attorney General of Texas

JAMES N. CASTLEBERRY, JR.
Assistant Attorney General

SAM C. RATLIFF
Assistant Attorney General

RUDY G. RICE
Assistant Attorney General

Attorneys for Respondent,
The State of Texas

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Supreme Court of the United States

OCTOBER TERM, 1953

No. 380

ELMER VOGT,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner was duly and legally charged by information and complaint with the offense of unlawfully carrying a pistol, being a violation of Article 483, Texas Penal Code (Vernon 1948), said charges being filed on November 10, 1952. Petitioner waived a jury and said cause was tried before the Judge in County Court at Law No. 2 of Bexar County, Texas, being Cause No. 95,045 in said court. Petitioner was found guilty of said charge and assessed a fine of $125.00 and costs.

The case was appealed to the Court of Criminal Appeals of Texas, being No. 26,445 in the Court of

Criminal Appeals. On May 20, 1953, judgment of the trial court was affirmed, *Vogt v. State*, ... Tex. Crim. ....., 258 S.W. 2d 795 (1953). Petitioner filed motion for rehearing which was heard by the appellate court and overruled on June 24, 1953. On June 26, 1953, mandate was issued.

STATEMENT OF THE CASE

Petitioner has attempted to raise the following points and thus invoke the jurisdiction of this Court.

1. That the arrest, search, seizure, jailing, and trial of petitioner were without due process of law.

2. That the petitioner was convicted in the trial court by the use of evidence obtained through search and seizure contrary to the laws and Constitution of Texas and the United States, and by testimony relating thereto.

3. That petitioner was a "traveler" and thus came within the exceptions provided by Article 484 of Texas Penal Code (Vernon 1948).

In his brief in support of his petition for writ of certiorari, the petitioner relies on the following:

(1) Article 454, Texas Code of Criminal Procedure (Vernon 1948), (2) Section 9 of Article I of the Constitution of Texas, (3) the Fourth Amendment to the Constitution of the United States (erroneously designated by petitioner as Article IV of the Constitution of the United States), and (4) the Fifth Amendment to the Constitution of the United States (erroneously designated by petitioner as Article V of the Constitution of the United States).

RESPONDENT'S COUNTER POINTS

1. Petitioner has already paid the fine and court costs adjudged in this case, and, there being no legal after-affects remaining, any and all questions pertaining to this case are now moot.

2. Petitioner has not invoked the jurisdiction of this Court under the provisions of 28 U.S. Code 1257(3).

3. The requirements of due process relating to the arrest, search, seizure, jailing, and trial of petitioner were fully satisfied.

4. The question raised by petitioner as to whether he was a "traveler" should not be reviewed by this Court.

RESPONDENT'S COUNTER POINT ONE

(To all of Petitioner's Particulars)
(Restated)

Petitioner has already paid the fine and Court costs adjudged in this case, and, there being no legal after-effects remaining, any and all questions pertaining to this case are now moot.

Argument and Authorities

This Honorable Court does not have jurisdiction of this cause for the primary reason that said cause is moot in that petitioner has paid his fine, assessed in the court below, of $125.00 plus costs in full and there are no legal after-effects.

On December 1, 1952, petitioner was tried for unlawfully carrying a pistol. He was found guilty and

assessed a fine of $125.00 and costs. Petitioner appealed to the Court of Criminal Appeals and on May 20, 1953, the Court of Criminal Appeals affirmed the judgment of the trial court.

Petitioner filed a motion for rehearing which was denied by the appellate court and overruled on June 24, 1953. On June 26, 1953, the Court of Criminal Appeals issued mandate. Petitioner did not at any time file a motion with the Court of Criminal Appeals to stay issuance of mandate.

On June 29, 1953, petitioner satisfied mandate in full by serving one day in jail and paying a fine and costs of $157.75.

Therefore, since petitioner has fully paid his fine and court costs and there are no legal after-effects, said cause is moot and this Honorable Court is without jurisdiction to entertain same. *Fiswick v. United States*, 329 U.S. 211 (1946); *St. Pierre v. United States*, 319 U.S. 41 (1943).

RESPONDENT'S COUNTER POINT TWO

(To all of Petitioner's Particulars)
(Restated)

Petitioner has not invoked the jurisdiction of this Court under the provisions of 28 U.S. Code 1257(3).

Argument and Authorities

Examination of the record of proceedings had and evidence adduced in the trial of this case reveals that the petitioner did not set up or claim any right, privilege, or immunity under the Constitution or laws of the United States. Any and all rights, priv-

ileges, and immunities asserted in the trial of this case were confined by petitioner to those inuring to him by virtue of the Constitution and laws of the State of Texas.

The only occasion on which petitioner even mentioned rights, privileges, or immunities under the Constitution and laws of the United States is in petitioner's Bill of Exceptions No. 4. It is rather difficult to ascertain just what particular right, if any, petitioner was asserting. If it be said that he was trying to assert a right under the Constitution of the United States to have his exception (to the admission of the pistol and the testimony of the State's witnesses relating thereto) signed and made a part of the record of this case, then petitioner has not set up or claimed a right under the Constitution of the United States and Amendments thereto because no such right exists thereunder. If it be said that petitioner's Bill of Exceptions No. 4 asserts the right against unreasonable searches and seizures under the Fourth Amendment to the Constitution of the United States, then his contentions are without merit, for the rule has long been established that the said Fourth Amendment operates solely on the actions of the Federal Government and its agencies. It does not apply to a State nor does it have any applicability to criminal prosecutions in State courts. *Wagner v. United States*, 337 U.S. 944 (1949); *United States v. Diuguid*, 325 U.S. 857 (1945); *Miller v. United States*, 284 U.S. 651 (1931); *Weeks v. United States*, 232 U.S. 383 (1914); *Adams v. New York*, 192 U.S. 585 (1904); *Brown v. New Jersey*, 175 U.S. 172 (1899).

If it be said that petitioner is attempting to assert a right under the Fifth Amendment to the Constitution of the United States, such contentions have no merit. The protection of the right against self incrimination under the said Fifth Amendment is restrictive of Federal action only, and does not operate on the states, state statutes, nor criminal proceedings in state courts. *Ensign v. Pa.*, 227 U.S. 592 (1913); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Hale v. Henkel*, 201 U.S. 43 (1906).

It is also well established that the due process clause of the Fourteenth Amendment does not protect in State proceedings the right against self-incrimination secured to an accused by the Fifth Amendment. *Adamson v. California*, 332 U.S. 46 (1947); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Twining v. New Jersey*, 211 U.S. 78 (1908).

The burden is upon the party invoking the jurisdiction of this Court to affirmatively show by the record that the federal questions which he seeks to place before this Court were properly raised, set up, or claimed in the trial court as required by the State practice. *Pennsylvania R. Company v. Illinois Brick Company*, 297 U.S. 447 (1936); *Hartford Life Insurance Company v. Johnson*, 249 U.S. 490 (1919); *Barbour v. Georgia*, 249 U.S. 454 (1919); *Missouri Pacific Company v. Taber*, 244 U.S. 200 (1917); *Louisville & Nashville R.R. Company v. Woodford*, 234 U.S. 46 (1914); *Mutual Life Insurance Company v. McGrew*, 188 U.S. 291 (1903); *Erie R.R. Company v. Purdy*, 185 U.S. 148 (1902); *Miller v. Texas*, 153 U.S. 535 (1894); *Brown v. Massachusetts*, 144 U.S. 573 (1892); *Chappell v. Bradshaw*,

128 U.S. 132 (1888); *Spies v. Illinois*, 123 U.S. 131 (1887).

The petitioner has failed to make the required affirmative showing by the record that any particular federal question was properly raised in the trial of this case. An examination of the record reveals that the only specific questions raised by the petitioner in the trial of this case were questions pertaining to the laws and the Constitution of Texas.

Where the State appellate court makes no express ruling pertaining to a federal question but rather simply ignores or fails to notice the same, this Court has established the rule that it will decline jurisdiction where it appears that the question was not raised in the trial court in accordance with the State practice. *Chicago, Indiana & L. R. Company v. McGuire*, 196 U.S. 128 (1905); *Mutual Life Insurance Company v. McGrew*, 188 U.S. 291 (1903); *Layton v. Missouri*, 187 U.S. 356 (1902); *Jacobi v. Alabama*, 187 U.S. 133 (1902); *Morrison v. Watson*, 154 U.S. 111 (1894). In such cases, in the absence of affirmative showing to the contrary, it will be inferred by this Court that the question was not decided upon in the State court because of its untimely presentation. *Chicago, Indiana & L. R. Company v. McGuire*, 196 U.S. 128 (1905).

This petitioner has failed to show this Court that any particular federal questions were properly raised on the appeal of this case from the trial court to the Texas Court of Criminal Appeals. Examination of the decision rendered by the Texas Court of Criminal Appeals fails to disclose any ruling by that Court on any federal question. Objections to evi-

dence must be specific in order to be considered on appeal. *Hughes v. State*, 152 Tex. Crim. 297, 213 S.W. 2d 820 (1948); *Hernandez v. State*, 60 Tex. Crim. 30, 129 S.W. 1109 (1910). The practice in this State requires that the Court of Criminal Appeals pass on all questions properly presented to it on appeal, but where an appellant fails to properly present any question on appeal, the Court is not required to pass on it. *Stokes v. State*, 136 Tex. Crim. 443, 125 S.W. 2d 311 (1939); *Wallace v. State*, 103 Tex. Crim. 203, 279 S.W. 832 (1926); *Debth v. State*, 80 Tex. Crim. 4, 187 S.W. 341 (1916); *Spears v. State*, 41 Tex. Crim. 527, 56 S.W. 347 (1900).

RESPONDENT'S COUNTER POINT THREE

(To Petitioner's 1st Particular)
(Restated)

The requirements of due process relating to the arrest, search, seizure, jailing, and trial of petitioner were fully satisfied.

Argument and Authorities

This petitioner's contentions relating to absence of due process are laid under the Fifth Amendment to the Constitution of the United States. It is well settled that this Amendment constitutes a restriction on the federal government and its agencies, but not on the states. *Palko v. State of Connecticut*, 302 U.S. 319 (1937).

Even if petitioner's contentions concerning due process could be said to arise from the requirements

of the Fourteenth Amendment to the Constitution of the United States, it is well settled that the due process requirements of the Fourteenth Amendment pertain to due process according to the Constitution and laws of the particular state and not to the process of another state or of the United States, for what due process requires in one state may not necessarily be due process in another. *Palko v. State of Connecticut*, 302 U.S. 319 (1937); *Dohany v. Rogers*, 281 U.S. 363 (1930); *Maxwell v. Dow*, 176 U.S. 581 (1900); *Hurtado v. California*, 110 U.S. 516 (1884). While due process is a matter of substance, as well as procedure, it does not guarantee against judicial error. The essential elements of due process are notice and opportunity to be heard and to defend, before a competent tribunal, in an orderly proceeding adapted to the nature of the case, which is uniform and regular, and in accordance with established rules which do not violate fundamental rights. *Brown v. South Carolina*, 298 U.S. 639 (1936); *Owens v. Battenfield*, 280 U.S. 605 (1929); *Caldwell v. Texas*, 137 U.S. 692 (1891); *Ex parte Wall*, 107 U.S. 265 (1882). There is no violation of the guarantee of due process of law where these conditions are fulfilled. *Dohany v. Rogers*, 281 U.S. 363 (1930); *Frank v. Mangum*, 237 U.S. 309 (1915).

An examination of the record relating to the trial of the petitioner provides a clear showing that all of the due process requirements pertaining to criminal proceedings in the State of Texas were fully complied with.

One of petitioner's contentions is that he suffered a false and unlawful arrest. The statutes in Texas which authorized the arrest without warrant in this case are as follows:

Article 212, Texas Code of Criminal Procedure (Vernon 1948).

> "A peace officer or any other person, may, without warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony, or as an 'offense against the public peace.' "

Articles 474 and 475, Texas Penal Code (Vernon 1948), define offenses against the public peace.

> Article 474—"Whoever shall go into or near any public place, . . . and shall use loud and vociferous, or obscene, vulgar or indecent language or swear or curse, or yell or shriek . . . in a manner calculated to disturb the person or persons present at such place or house, shall be punished by a fine not exceeding Two Hundred Dollars ($200)."
>
> Article 475—"A 'public place,' as used in the two preceding articles, is any public road, street or alley of a town or city, or any store or work shop or any place at which people are assembled or to which people commonly resort for purposes of business, amusement or other lawful purpose."

Article 803, Texas Penal Code (Vernon 1948), states:

> "Any peace officer is authorized to arrest without warrant any person found committing

a violation of any provision of the preceding articles of this chapter."

Article 802, Texas Penal Code (Vernon 1948) of this same chapter, and which precedes Article 803, states:

> "Any person who drives or operates an automobile or any other motor vehicle upon any public road or highway in this State, or upon any street or alley within the limits of an incorporated city, town or village, while such person is intoxcated or under the influence of intoxicating liquor, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not less than ten (10) days nor more than two (2) years, or by a fine of not less than Fifty Dollars ($50) nor more than Five Hundred Dollars ($500), or by both such fine and imprisonment."

The testimony of the peace officer was that the car in which petitioner was riding was going an estimated seventy to seventy-five miles per hour when it passed the peace officer (S.F. p. 18). That petitioner made a sign with his hand and cursed the peace officer as he passed the peace officer on a public highway (S.F. p. 4, 5, 20). Testimony further indicates that petitioner's automobile was driven in a reckless manner (S.F. p. 3, 4, 5). The record also shows that petitioner was in a drunken condition at the time he was arrested around midnight (S.F. p. 8, 21). The officer testified that he arrested peti-

tioner for "disturbing the peace" on a public road (S.F. p. 21, 22).

These acts certainly constituted a breach of the peace on the part of petitioner in the presence of the peace officer.

The driver of the car in question, Kenneth Wheeler, was arrested for driving while intoxicated (S.F. p. 24). Under the law of arrest in Texas, the arrest was certainly legal and authorized.

Petitioner also contends and complains that search of his automobile was illegal. *Shepperd v. State*, 127 Tex. Crim. 144, 74 S.W. 2d 1027 (1934), held that officers may properly search an automobile after it had been legally stopped and the operator legally arrested. No search warrant is necessary in order to search the vehicle in which a person is riding at the time of his arrest for an offense committed in the presence of an officer. *Baker v. State*, 154 Tex. Crim. 116, 225 S.W. 2d 828 (1950); *Linthicum v. State*, 134 Tex. Crim. 608, 116 S.W. 2d 714 (1938); *Shepperd v. State*, 127 Tex. Crim. 144, 74 S.W. 2d 1027 (1934); *Melton v. State*, 110 Tex. Crim. 439, 10 S.W. 2d 384 (1927). As the arrest in this case was legal, the car could be searched and thus the fruits of the search, the pistol, could be introduced in evidence against the petitioner. *Hurley v. State*, 155 Tex. Crim. 315, 234 S.W. 2d 1006 (1950); *Baker v. State*, 154 Tex. Crim. 116, 225 S.W. 2d 828 (1950); *Linthicum v. State*, 134 Tex. Crim. 608, 116 S.W. 2d 714 (1938).

The question as to whether or not the officers were authorized to arrest petitioner, search his automo-

bile, and seize the pistol found in the glove compartment of the car, which pistol the State claims he was thereby unlawfully carrying, ceased to be an issue when petitioner, while testifying as a witness in his own behalf, admitted his possession of the pistol and the presence of the pistol in the automobile at the time of his arrest. Petitioner also admitted ownership of the pistol. An accused may not complain of the receipt in evidence of facts to which he himself also testified. *Soble v. State*, 153 Tex. Crim. 629, 218 S.W. 2d 195 (1948), certiorari denied 338 U.S. 866 (1949); *Lee v. State*, 148 Tex. Crim. 220, 185 S.W. 2d 978 (1945); *Hamilton v. State*, 145 Tex. Crim. 78, 165 S.W. 2d 737 (1942); *Carrizal v. State*, 138 Tex. Crim. 103, 134 S.W. 2d 287 (1940); *Goss v. State*, 136 Tex. Crim. 166, 124 S.W. 2d 381 (1939); *Due v. State*, 123 Tex. Crim. 73, 57 S.W. 2d 849 (1933); *Reusch v. State*, 119 Tex. Crim. 112, 45 S.W. 2d 209 (1932).

RESPONDENT'S COUNTER POINT FOUR

(To Petitioner's 4th Particular)
(Restated)

The question raised by petitioner as to whether he was a "traveler" should not be reviewed by this Court.

Argument and Authorities

Article 484 of the Texas Penal Code (Vernon 1948) states in part that Article 483 of the Texas

Penal Code (Vernon 1948) does not apply to "persons traveling." But the rule is well settled in Texas that whether one is a "traveler" privileged to carry a pistol is generally a question of fact. *Hill v. State*, 100 Tex. Crim. 212, 272 S.W. 450 (1925); *George v. State*, 90 Tex. Crim. 179, 234 S.W. 87 (1921).

Petitioner in this case claimed the privilege of a traveler on the ground that he was riding in a car from San Antonio, Texas, to an originally intended destination of Boerne, Texas, a distance of some thirty to thirty-five miles. Two Texas cases in which approximately the same mileage was involved in prosecutions for violation of Article 483 held that the defendant was not a "traveler" within the meaning of Article 484. In the case of *George v. State*, 90 Tex. Crim. 179, 234 S.W. 87 (1921) the accused drove an automobile to a city forty miles away and returned on the same day. In the case of *Wortham v. State*, 95 Tex. Crim. 135, 252 S.W. 1063 (1923) the defendant traveled from a point in one county to a point thirty-five miles distant in another county. In addition, a person cannot claim the benefit of exemption as a traveler when he stops on his journey and engages in business or pleasure. *Colson v. State*, 52 Tex. Crim. 138, 105 S.W. 507 (1907); *Navarro v. State*, 50 Tex. Crim. 326, 96 S.W. 932 (1906); *Ratigan v. State*, 33 Tex. Crim. 301, 26 S.W. 407 (1894); *Stilly v. State*, 27 Tex. Crim. 445, 11 S.W. 458 (1889).

The State having shown that the accused was carrying a pistol, it devolved on the petitioner to show either that he had authority therefor or that he

came within the exemptions provided by Article 484. Hutspeth v. State, ... Tex. Crim. ....., 254 S.W. 2d 130 (1953); *Wagner v. State*, 80 Tex. Crim. 66, 188 S.W. 1001 (1916); *Hunter v. State*, 73 Tex. Crim. 459, 166 S.W. 164 (1914); *Skeen v. State*, 34 Tex. Crim. 308, 30 S.W. 554 (1895); *Stilly v. State*, 27 Tex. Crim. 445, 11 S.W. 458 (1889); *Blair v. State*, 26 Tex. Crim. 387, 9 S.W. 890 (1888); *Lewis v. State*, 7 Tex. Crim. 567 (1880).

In the trial of this case, petitioner waived a trial by jury and the trial judge became the trier of the facts. Thus the trial judge was not bound by petitioner's contentions that he should be exempted. The trial judge had the right to accept or refuse to accept petitioner's testimony during the trial as true. *Hutspeth v. State*, ... Tex. Crim. ....., 254 S.W. 2d 130 (1953); *French v. State*, 126 Tex. Crim. 246, 70 S.W. 2d 1002 (1934). A review of the record in this case provides a clear showing that the petitioner was not a traveler within the meaning of Article 484. The testimony of petitioner and of the petitioner's own witness leads to the inescapable conclusion that on the night in question the true purpose of their trip was solely to find some place of entertainment. The testimony of the petitioner and his witness shows that on the night in question (which was a Saturday night), they stopped at several places which might be colloquially referred to as "Beer Joints" or "Dance Halls".

The question of whether petitioner was a traveler was reviewed by the Texas Court of Criminal Appeals and the Court affirmed the holding of the trial court that the petitioner was not a traveler.

CONCLUSION

It is respectfully submitted that this case is not a proper one for review by this Court and that the petition for writ of certiorari should be denied.

JOHN BEN SHEPPERD
Attorney General of Texas

JAMES N. CASTLEBERRY, JR.
Assistant Attorney General

SAM C. RATLIFF
Assistant Attorney General

RUDY G. RICE
Assistant Attorney General
Capitol Station
Austin, Texas

Attorneys for Respondent,